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No. _____

**In the**
**Supreme Court of the United States**
**October Term, 2002**

GUY W. COLSTAD,
*Petitioner,*

*v.*

STATE OF WISCONSIN,
*Respondent.*

**Petition for Writ of Certiorari to the Court of Appeals of Wisconsin**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Fourth Amendment permit an officer to detain a motorist when the circumstances demonstrate a reasonable suspicion, but not probable cause to believe, that the motorist committed a noncriminal traffic violation?

2. Does the Fourth Amendment permit a detention of forty-five minutes prior to the start of an investigation when the officer is unable to articulate a reasonable suspicion that the detained person violated any law?

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## PETITION FOR WRIT OF CERTIORARI

Guy W. Colstad respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Wisconsin entered in this proceeding on January 30, 2003 in order to resolve a conflict in the state and federal courts on an important question of federal law: whether the Fourth Amendment prohibits an officer from detaining a motorist to investigate a civil traffic violation when the officer did not witness the violation and lacks probable cause to believe that the violation occurred.

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## OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin that gives rise to this petition is published at 659 N.W.2d 394 (Wis. Ct. App. 2003). It is reprinted in the attached appendix. (App. 1) By order dated April 22, 2003, the Supreme Court of Wisconsin denied a petition to review the decision of the court of appeals. That order is reprinted in the attached appendix. (App. 16)

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## JURISDICTION

The Court of Appeals of Wisconsin rendered its decision on January 30, 2003. Colstad timely petitioned the Wisconsin Supreme Court to review

the court of appeals' decision. On April 22, 2003, the Wisconsin Supreme Court entered a final order denying the petition for review. (App. 16) No extensions of time have been requested or granted for filing this petition for a writ of certiorari.

The United States Supreme Court has jurisdiction to review the judgment of the state court pursuant to 28 U.S.C. § 1257.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.

Wisconsin's statute prohibiting inattentive driving, Wis. Stat. § 346.89(1), states:

> No person while driving a motor vehicle shall be so engaged or

> occupied as to interfere with the safe driving of such vehicle.

The penalty for violating Wis. Stat. § 346.89(1) is found in Wis. Stat. § 346.95(2) which states in relevant part:

> Any person violating s. 346.89(1) ... may be required to forfeit not less than $20 nor more than $400.

Wisconsin's distinction between crimes and civil forfeitures is found in Wis. Stat. § 939.12, which provides:

> A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

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## STATEMENT OF THE CASE

### Procedural History

Guy Colstad was charged in a criminal complaint with homicide by the operation of a motor vehicle with a prohibited alcohol concentration. (R. 3) Colstad subsequently entered a guilty plea to the charge. (R. 48) His sentence was withheld and he was placed on probation. As a condition of his probation,

Colstad was required to serve 9 months in jail. (R. 39)

The federal question at issue in this petition was first raised in a motion timely filed in the trial court to suppress evidence that derived from Colstad's detention and arrest. (R. 15) The court held a suppression hearing on February 23, 2001. (R. 46) On March 19, 2001, the court denied the suppression motion in an oral ruling. (R. 47) Wisconsin law provides that a guilty plea does not waive issues raised in a motion to suppress evidence at trial. Wis. Stat. § 971.31(10).

The federal question was raised again in Colstad's initial and supplemental briefs filed in the Court of Appeals of Wisconsin. In a published decision, the court of appeals ruled that there was no Fourth Amendment violation. (App. 4-8) The federal question was raised again in a petition for discretionary review of the court of appeals' decision filed with Wisconsin's highest court, the Wisconsin Supreme Court. The supreme court declined to exercise its discretionary power to review the published decision of the court of appeals. (App. 16)

**Facts**

Officer Gary Napralla went to the scene of a traffic accident on a village street at about 8:15 p.m. on April 21, 2000. He saw Guy Colstad, who he knew, and he recognized Colstad's truck, which was parked in the road. He also saw a child lying on the street in front of the truck. An

EMT had already arrived at the accident scene. (R. 46: 6-9, 48) The sun was setting. (R. 46: 10)

Napralla talked to Colstad, who was standing at the rear of his truck. Colstad was not leaning against the truck for support. He was standing upright. He was not staggering or swaying or exhibiting any balance problem of any nature. (R. 46: 9, 32-33)

Napralla asked Colstad whether he had been driving the truck, and Colstad said that he had been driving the truck at about 15 to 20 miles per hour, that he saw several children on the north side of the street, and that a lone child on the south side of the street had suddenly darted out into the road. Colstad thought the child had run into the side of his truck so he stopped. The speed limit on the street where the accident occurred was 25 miles per hour. Napralla saw no evidence to suggest that Colstad had been speeding or that he had violated any other traffic law. (R. 46: 9, 31-32)

As Napralla spoke to Colstad, he did not detect any odor of alcohol. Colstad's speech was not slurred. Colstad's eyes were not glassy or glazed over or bloodshot. There was nothing unusual about Colstad's appearance that would have led him to believe that Colstad was under the influence of alcohol. (R. 46: 33)

After speaking with Colstad for one to two minutes, Napralla directed Colstad to move to a location about 25 or 30 yards away from the accident scene. Napralla told Colstad to stay there until he could talk to him again. Colstad was not free to leave because Napralla had directed him to remain. At that point, Napralla

knew that an accident had occurred as a result of a child darting unexpectedly in front of Colstad's truck, but he had no reason to believe Colstad had violated any law, and he had no suspicion that Colstad had driven under the influence of an intoxicant. (R. 46: 11, 33-34, 49)

Napralla first spoke to Colstad for about two minutes at 8:17 p.m. (R. 46: 25). Napralla did not contact Colstad again until 9:02 p.m., when he decided to administer field sobriety tests. He did not finish the tests until 9:20 p.m. (R. 46: 47) During the time that Colstad was waiting for Napralla, Napralla did not see Colstad stagger, sway, or behave in an unusual way. (R. 46: 34-35) Napralla helped provide medical attention to the child, then took photographs of the scene and was marking the truck before he renewed his encounter with Colstad. (R. 46: 49)

Napralla administered field sobriety tests to Colstad. The odor of alcohol was Napralla's only reason for deciding to administer field sobriety tests to Colstad. (R. 46: 37, 50)

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## ARGUMENT

### I. THE FOURTH AMENDMENT DOES NOT PERMIT AN OFFICER TO DETAIN A MOTORIST WHEN THE CIRCUMSTANCES DEMONSTRATE A REASONABLE SUSPICION, BUT NOT PROBABLE CAUSE TO BELIEVE, THAT THE MOTORIST COMMITTED A NONCRIMINAL TRAFFIC VIOLATION

Colstad, having been in a traffic accident with a small child, complied with the obligations imposed by Wisconsin law. *See* Wis. Stat. § 346.67. Colstad stopped and remained at the scene, made sure that medical care would be provided, and identified himself to the officer who promptly arrived at the scene. (R. 46: 7-9, 18) After he met those obligations, Wisconsin law did not require him to remain at the scene of the accident. *State v. Mann*, 120 Wis.2d 629, 634, 357 N.W.2d 9 (Ct.App. 1984), *rev'd on other grounds*, 123 Wis.2d 375, 367 N.W.2d 209 (1985); *State v. Lloyd*, 104 Wis.2d 49, 63, 310 N.W.2d 617 (Ct.App. 1981). Officer Napralla nonetheless detained Colstad. He did so despite his candid admission that he had no reason to suspect that Colstad had violated any law. (R. 46: 32, 34) Carving out a dramatic new exception to the Fourth Amendment, the Wisconsin Court of Appeals held that, notwithstanding Napralla's inability to articulate any justification for a detention, the detention was justified because the facts permitted a reasonable suspicion (but not

probable cause to believe) that Colstad had committed the noncriminal traffic offense of inattentive driving. *State v. Colstad*, No. 01-2988-CR, slip op. at ¶¶ 13-14 (Jan. 30, 2003).

In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), the United States Supreme Court held that an officer may not detain an individual for "investigation" unless the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that *criminal activity* may be afoot." (emphasis added) The Court arrived at that standard by balancing an individual's liberty interest in avoiding detention against the government's interest in "effective crime prevention and detection." *Terry*, 392 U.S. at 22. Brief investigative detentions serve the purpose "of investigating possible *criminal* behavior even though there is no probable cause to make an arrest." *Id.* (emphasis added).

Before *Terry*, "any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause." *Florida v. Royer*, 460 U.S. 491, 498 (1983). *See, e.g., Carroll v. United States*, 267 U.S. 132 (1925) (holding that police may not stop a vehicle in the absence of probable cause). "*Terry* created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit *a crime*." *Royer*, 460 U.S. at 498. (emphasis added). While this departure from precedent was deemed necessary for effective law enforcement, the Court recognized that "even this type of 'necessarily swift action predicated upon

the on-the-spot observations of the officer on the beat' constituted a 'serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.'" *Dunaway v. New York*, 442 U.S. 200, 209 (1979), *quoting Terry*, 392 U.S. at 20, 17. Accordingly, the authority to detain an individual in the absence of probable cause was "narrowly defined" and the Court "has been careful to maintain [the] narrow scope" of a *Terry* detention. *Id.* at 210.

*Terry* emphasized that detaining an individual on something less than probable cause is consistent with the reasonableness requirement of the Fourth Amendment only because such detentions serve a legitimate interest in detecting or preventing crime. Later cases continued to limit the availability of a *Terry* detention to investigations of criminal behavior. *E.g., United States v. Arvizu*, 534 U.S. 266 (2002), *quoting United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that *criminal activity* 'may be afoot'") (emphasis added); *United States v. Place*, 462 U.S. 696, 702 (1983) (police have authority to make a forcible stop of a person only if they have a reasonable suspicion that "that the person has been, is, or is about to be engaged in *criminal activity*") (emphasis added); *Royer*, 460 U.S. at 498; *United States v. Cortez*, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in *criminal activity*") (emphasis added); *Brown v. Texas*, 443 U.S. 47, 51 (1979) (officers who lack probable

cause to arrest may not detain an individual without "a reasonable suspicion, based on objective facts, that the individual is involved in *criminal activity*") (emphasis added). As one commentator has observed, "[t]he case law requires that a police officer have a reasonable suspicion of *criminal activity* in order to stop a suspect." 2 W. Ringel, *Searches and Seizures, Arrests and Confessions* § 13.1(d) at 9 (2d ed. 2002) (emphasis added).

Despite the Court's repeated use of language that limits *Terry* detentions to investtigations of criminal behavior, the Wisconsin Court of Appeals followed a state court precedent that authorized *Terry* detentions for the investigation of noncriminal traffic violations. *Colstad,* slip op. at ¶¶ 11-13. The court held that Napralla was entitled to detain Colstad to investigate the civil traffic violation of inattentive driving. *Id.* The "narrowly defined" scope of *Terry* detentions that the Court has carefully maintained, *Dunaway,* 442 U.S. at 210, has been substantially expanded by the Wisconsin Court of Appeals.

No Supreme Court case has held that the Fourth Amendment permits an officer to detain an individual who is merely *suspected* of having committed a noncriminal traffic offense. There is no doubt that an officer may stop a vehicle or detain a driver if the officer actually observes a traffic violation. The officer's personal observation of the violation provides probable cause to make the stop. *Arkansas v. Sullivan,* 532 U.S. 769, 771 (2001) (*per curiam*). It is not the suspicion of a traffic violation that justifies the stop, but the

officer's actual observation of an offense. 4 W. LaFave, *Search and Seizure* § 9.2(c) at 29 n.44 (3d ed. 1996).

The Supreme Court has recognized that probable cause is the controlling standard when a stop is for a minor traffic violation. *City of Indianapolis v. Edmond*, 531 U.S. 32, 51 (2000) ("The reasonableness of an officer's discretionary decision to stop an automobile ... turns on whether there is probable cause to believe that a traffic violation has occurred."); *Whren v. United States*, 517 U.S. 806, 811 (1996) (temporary detention of a motorist must be reasonable, and "the decision to stop an automobile is reasonable where the police have *probable cause* to believe that a traffic violation has occurred.") (emphasis added). The Wisconsin Court of Appeals' decision is in conflict with that precedent.

The decision is also in conflict with the logic underlying *Terry*. *Terry*, 392 U.S. at 9, reaffirmed the common law understanding that the right to be free from governmental restraint applies to "the citizen on the streets of our cities." "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Id., quoting Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

As *Terry* makes clear, common law principles have informed the Court's understanding of the warrantless seizures that may be deemed reasonable under the Fourth Amendment. Under the common law, warrantless

arrests were permitted for felonies. The common law prohibited warrantless arrests for "inferior offenses," including misdemeanors and breaches of the peace, unless they were committed in the arresting officer's presence. 9 *Halsbury's Laws of England, Criminal Law and Procedure* § 117 (2d ed. 1933); Blackstone, *Commentaries* *291; Leagre, *The Fourth Amendment and the Law of Arrest,* 54 J. Crim. L., Criminology & Pol. Sci. 393, 409 (1963), *citing* 2 Hale, *Pleas of the Crown* 88 (13th am. ed. 1947). Without a warrant, an officer could not arrest an individual for a breach of the peace or other minor offense after the offense was over; it was necessary to catch the offender in the act before the officer was entitled to act without judicial approval. Leagre, *supra,* at 410, *citing* 2 Hawkins, *Pleas of the Crown* 120-21 (8th ed. 1824).

When an officer sees an offense take place, the officer will generally have probable cause to arrest. Thus, the common law was largely consistent with modern Fourth Amendment law, which allows warrantless arrests for minor offenses to be made if they are supported by probable cause. The probable cause requirement assures that individuals are not subject to warrantless arrest when criminal behavior is only suspected or rumored, just as the common law did not permit warrantless arrests for minor offenses that the arresting officer did not personally observe.

Modern law permits warrantless arrests to occur when even the crime did not occur in the officer's presence, but only when there is probable cause to believe that the arrested individual

committed the crime. *See Brinegar v. United States,* 338 U.S. 160, 175-76 (1963) (probable cause to arrest depends upon facts known to officer, including trustworthy information provided by reliable sources). That expansion of the common law rule is consistent with the common law notion that a deprivation of liberty which is not authorized by a magistrate is lawful only if the circumstances demonstrate a high degree of confidence that the offense occurred. The deprivation of liberty is more difficult to justify when the level of confidence is less than a probability.

To permit a detention on less than probable cause, the interests of law enforcement must be substantial. *Place,* 462 U.S. at 704. The best indicator of whether a law enforcement interest is substantial is the legislature's judgment about how severely to penalize the suspected conduct. *Welsh v. Wisconsin,* 466 U.S. 740, 754 n.14 (1984). Only the suspicion of *criminal* behavior provides a substantial interest in detaining an individual in the absence of probable cause to believe that the law has been violated. When the interest at stake is less significant, as it is in the case of a noncriminal traffic offense, a detention should only be based upon probable cause, which will normally (although perhaps not always) mean that the officer has seen the offense occur.

Moreover, although the Supreme Court has permitted detentions to investigate persons reasonably suspected of having committed a felony outside of the officer's presence, it did not decide "whether Terry stops to investigate all past crimes, however serious, are permitted." *United*

*States v. Hensley*, 469 U.S. 221, 229 (1985). The need to protect the public by detaining an individual who may be committing a crime, or who may be about to commit a crime, is more compelling than the need to detain an individual who may have committed a crime in the past. *Id.* at 228. Thus, while *Hensley* allowed a *Terry* detention to investigate a completed felony, it is not reasonable to permit a *Terry* detention to investigate a completed civil traffic violation.

Although *Sullivan*, *Edmond*, and *Whren* all state that probable cause is required to detain a motorist for a traffic offense, lower courts are in conflict. As the Wisconsin Court of Appeals noted, *United States v. Callarman*, 273 F.3d 1284, 1296 (10th Cir. 2001), interprets *Whren* to hold that probable cause is a sufficient ground for a noncriminal traffic stop, but not a necessary ground.[1] Other courts have held that probable

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[1] Other cases upon which the court of appeals relied do not support the court's holding. In *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985), the court cited *Cortez*, 449 U.S. at 417, for its holding that a stop must be based on a suspicion of criminal activity. The stop in *Berge*, 374 N.W.2d at 731, was based on an officer's observations that allowed him to conclude that a motorist ran a stop sign. The officer therefore had probable cause to believe that a traffic violation occurred. In *State v. Farabee*, 22 P.3d 175, 177-78 (Mont. 2000), the officer personally observed that a car was missing a headlight, an offense that constitutes a misdemeanor under Montana law. The officer therefore had probable cause to believe a crime had been committed before making the stop. In *State v. Henderson*, 966 P.2d 137, 139 (Mont. 1998), the officer personally observed that required license plates

cause is needed to detain an individual for a noncriminal violation. *E.g., United States v. Cashman,* 216 F.3d 582, 586 (7th Cir. 2000) (*Whren* permits traffic stops on the basis of probable cause that even a minor traffic offense has been committed); *United States v. Wallace,* 213 F.3d 1216, 1218 (9th Cir. 2000) (*Whren* holds that officers conducting traffic stops "must have probable cause"); *State v. Richcreek,* 187 Ariz. 501, 930 P.2d 1304, 1308 (1997) (stop of driver who passed scene of accident was impermissible, even if officer suspected driver might have been involved in the accident, because detaining persons "not suspected of any criminal activity ... opens up vistas which we think go far beyond what is permitted by the Fourth Amendment."); *Cuva v. State,* 687 So.2d 274, 277 (Fla. App. 1997) (mere suspicion that an individual violated a curfew ordinance did not justify his detention because the officer had no reason to suspect he was committing a crime).

The logic of the Wisconsin Court of Appeals' decision would permit an officer to stop and detain a motorist to investigate a report that the motorist had been seen speeding days earlier. Detentions for noncriminal traffic violations which the officer does not witness and which are not

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were missing, and therefore had probable cause to believe that the driver was violating a traffic law. In *State v. Ova,* 539 N.W.2d 857, 858 (N.D. 1995), the officer personally observed that a motorist was driving carelessly by backing up at an excessive speed and apparently spinning his tires. The officer therefore had probable cause to believe that a traffic law was being violated.

otherwise supported by probable cause are not reasonable under the Fourth Amendment. The United States Supreme Court should grant *certiorari* to resolve this recurring and unsettled issue and to resolve the conflicting opinions in the lower courts.

## II. A DETENTION OF FORTY-FIVE MINUTES PRIOR TO THE START OF AN INVESTIGATION CANNOT BE JUSTIFIED UNDER THE FOURTH AMENDMENT WHEN THE OFFICER IS UNABLE TO ARTICULATE A REASONABLE SUSPICION THAT THE DETAINED PERSON VIOLATED ANY LAW

Officer Napralla candidly admitted that he harbored no suspicion that Colstad had violated any traffic law.

> Q At the point at which you directed Mr. Colstad to stay there, the evidence you had was that a child had darted unexpectedly in front of his truck, that the truck struck that child, but that Mr. Colstad, as far as you could tell, had not violated any law; is that true?
>
> A Yes.
>
> Q And you didn't have any suspicions at that point that

> Mr. Colstad had driven under the influence of an intoxicant, correct?
>
> A Correct.

(R. 46: 34) It is undisputed that Napralla did not suspect that Colstad had violated any traffic law when he detained Colstad. (R. 46: 32) He had no evidence that Colstad had been speeding. (R. 46: 31) Colstad was standing upright, was not leaning on his truck for support, was not staggering or swaying or exhibiting any balance problems. (R. 46: 32-33) Napralla did not smell any odor of alcohol coming from Colstad. Colstad's speech was not slurred. Colstad's eyes were not glassy or glazed or bloodshot. There was nothing unusual about Colstad's appearance that could have caused Napralla to believe that Colstad was under the influence of alcohol. (R. 46: 33)

Although he could not articulate any suspicion that Colstad had committed a traffic violation, Napralla detained Colstad. The record establishes that the detention lasted for 45 minutes before Napralla next spoke to Colstad. (R. 46: 7, 25, 47) Despite the absence of probable cause to arrest Colstad, the Wisconsin Court of Appeals held that an unarticulated suspicion that Colstad had committed the civil traffic violation of inattentive driving justified a 45 minute detention prior to conducting any investigation of Colstad's driving.[2] *Colstad,* slip op. at ¶ 18.

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[2] It is unclear what Napralla was doing during the 45 minutes during which he detained Colstad. He spent some unspecified amount of time assisting with

The brevity of a detention is "an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." *Place,* 462 U.S. at 709. The length of the detention alone may preclude the conclusion that a seizure is reasonable in the absence of probable cause.[3] See *id.* (90 minute detention required probable cause). Given that the court of appeals could discern only one traffic violation that Colstad may have committed in light of the facts known to Napralla — the civil offense of inattentive driving — Napralla's decision to detain Colstad for forty-five minutes before commencing his investigation was unreasonable.

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medical attention to the child. (R. 46: 49) However, EMT personnel, and apparently ambulances and fire trucks, arrived before or shortly after he did. (R. 46: 8-9, 47-48) After rendering whatever assistance he provided to the child, Napralla took photographs of the scene and marked the truck. (R. 46: 49) Napralla did not explain why it was necessary to keep Colstad detained while he did those tasks. From the record, it appears that Napralla simply made an arbitrary decision to conduct other aspects of his investigation without regard to the fact that he was unnecessarily prolonging his detention of Colstad.

[3] According to the American Law Institute, "a period of twenty minutes should suffice" to accomplish the purposes of an investigative detention. Model Code of Pre-Arraignment Procedure 283 (1975), *quoted in* W. LaFave, *Search and Seizure* 380 n. 129 (2d ed. 1987). Colstad was detained for 45 minutes before Napralla even started the field sobriety tests, which apparently took another 18 minutes. (R. 46: 47) The total detention that occurred prior to Colstad's arrest therefore exceeded one hour.

Nor could Napralla have been expected to investigate the traffic violation of inattentive driving, because it never occurred to Napralla that Colstad had driven inattentively. The justification for the detention was discerned by the court of appeals, not by Napralla. The purpose of a detention to investigate a suspected traffic violation cannot be served when the officer does not actually suspect that a traffic violation occurred. Napralla did not and could not investigate a suspicion that Colstad drove inattentively, because Napralla never suspected that Colstad committed any traffic violation.

Permitting a detention when the detaining officer admits that he had no suspicion that any offense had been committed subverts the Fourth Amendment. The Court has always insisted that the officer at least be able to articulate a reasonable suspicion to justify the detention. *See, e.g., Hensley,* 469 U.S. at 229 ("if police have a reasonable suspicion, grounded in specific and articulable facts," that suspect has committed a felony, detention is permitted); *Place,* 462 U.S. at 702 (officer may "make a forcible stop of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity"). True, whether the articulated basis for the stop is pretextual does not matter, so long as it is factually accurate and objectively reasonable. *Whren,* 517 U.S. at 510-13. But the Supreme Court has never countenanced an after-the-fact justification for a detention (no matter how objectively reasonable it may appear in hindsight) that was never contemplated, much less articulated, by the

officer who makes the detention. When an officer acknowledges that he had no suspicion that the defendant committed any offense at all, it does violence to the Fourth Amendment not to recognize the illegality of the decision to detain.

Allowing lengthy detentions to investigate suspicions of civil traffic violations that never actually occurred to the detaining officer creates a dangerous precedent. The Supreme Court should grant certiorari in this case to consider whether the Fourth Amendment permits investigative detentions under these circumstances.

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## CONCLUSION

For the reasons stated, the petition for a writ or certiorari should be granted.

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[Filed January 30, 2003]

IN COURT OF APPEALS
FOR STATE OF WISCONSIN
DISTRICT IV

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Case No. 01-2988-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

*v.*

GUY W. COLSTAD,

Defendant-Appellant.

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DECISION

APPEAL from a judgment of the circuit court for Columbia County: RICHARD L. REHM, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1. LUNDSTEN, J. Guy W. Colstad appeals a judgment of the circuit court convicting him of homicide by use of a vehicle while having a prohibited alcohol concentration, contrary to Wis. Stat. § 940.09(1)(b) (1997-98).[1] Colstad argues that the results of his blood test should have been suppressed because (1) neither probable cause of a civil traffic violation, nor reasonable suspicion of a crime,

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[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

supported the initial investigative detention of Colstad; (2) the initial detention was not temporary, but was instead an illegal *de facto* arrest; (3) the facts known to the investigating officer did not provide reasonable suspicion of intoxication and, therefore, Colstad should not have been subjected to field sobriety tests; and (4) the results of the preliminary breath test should not have been considered by the trial court when assessing whether probable cause supported both Colstad's arrest and the subsequent blood draw. We disagree with each of Colstad's arguments and affirm.

***Background***

¶2. On April 21, 2000, the pickup truck Colstad was driving collided with a child, causing severe injuries to the child, who later died. The responding officer testified that the collision occurred at about sunset, that there were no cars or trees obscuring the view alongside the road, that the road was straight, and that the view was "[a]bsolutely clear." The speed limit where the collision occurred was twenty-five miles per hour. The seriously injured child lay "to the front" of Colstad's pickup truck. The child's injuries appeared so severe that the officer believed the child would die.

¶3. After briefly observing the scene, the officer made contact with Colstad at approximately 8:17 p.m. Colstad reported that the child darted out into the road and ran into the side of his truck. Colstad told the officer he had been driving approximately fifteen to twenty miles per hour because he noticed several children were present on one side of the street, and he was used to seeing lots of children in that area.

¶4. After speaking with Colstad for one or two minutes, the officer directed Colstad to wait at a location away from the accident scene. During this contact, the officer

did not notice Colstad exhibiting signs of intoxication. The officer then proceeded to assist with providing CPR to the child. He also photographed and marked the scene. The officer described the scene as chaotic, with ambulances, fire trucks, and onlookers present.

¶5. Sometime later, the officer contacted Colstad a second time. During this second encounter, the officer detected a mild odor of intoxicants on Colstad, and Colstad admitted having had two beers that evening. At 9:02 p.m., the officer directed Colstad to perform field sobriety tests and then administered a preliminary breath test. It is undisputed that the results of these tests, combined with other information, supplied probable cause to arrest Colstad for operating a vehicle while intoxicated. A subsequent test revealed that Colstad's blood alcohol content was .117%.

¶6. Colstad was charged with homicide by operation of a vehicle while under the influence of an intoxicant, homicide by operation of a vehicle with a prohibited alcohol concentration, and homicide by negligent operation of a vehicle. Colstad moved to suppress the test results from breath and blood samples taken from him, as well as the results of the field sobriety tests. The trial court denied the motion, and Colstad pled guilty to homicide by operation of a vehicle while having a prohibited alcohol concentration.

## *Discussion*

### *A. Whether Colstad's Initial Detention was Justified by Reasonable Suspicion of a Civil Traffic Violation*

¶7. The State does not dispute that the officer seized Colstad when he directed Colstad to move to a location away from the accident scene and wait. We will assume a seizure occurred at this point in time. The State also appears to

concede that evidence subsequently obtained, including the results of the field sobriety tests and the blood draw, should be suppressed if this initial temporary seizure was illegal. Thus, we must decide whether the initial investigative seizure violated Colstad's Fourth Amendment protection against unreasonable seizures.

¶8. In order to justify an investigatory seizure, "[t]he police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623. "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997). Before initiating a brief stop, an officer is not required to rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990). "A trial court's determination of whether undisputed facts establish reasonable suspicion justifying police to perform an investigative stop presents a question of constitutional fact, subject to *de novo* review." ***State v. Sisk***, 2001 WI App 182, ¶7, 247 Wis. 2d 443, 634 N.W.2d 877.

¶9. The State argues there was reasonable suspicion to believe Colstad had committed a *criminal* violation, such as causing great bodily harm by negligent operation of a vehicle under Wis. Stat. § 346.62. We question whether the facts known to police amounted to probable cause to believe Colstad was criminally negligent,[2] but we need not resolve

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[2] "'[C]riminal negligence' means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another ...." WIS. STAT. § 939.25(1). At the time Colstad was initially

the issue. Rather, we agree with the State's contention that a temporary investigative stop was justified by reasonable suspicion that Colstad violated a traffic ordinance.

¶10. The State argues that the facts known to police justified an investigative stop because the facts supplied reasonable suspicion to believe Colstad violated a traffic ordinance prohibiting inattentive driving. Colstad responds that an officer must possess *probable cause* before detaining a citizen based on suspicion of any civil infraction; that mere reasonable suspicion only justifies an investigatory stop if the suspected offense is a crime.

¶11. This court addressed the applicability of the reasonable suspicion standard to a non-criminal traffic violation in ***State v. Griffin***, 183 Wis. 2d 327, 515 N.W.2d 535 (Ct. App. 1994). In ***Griffin***, we held that an officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation. *See* ***id.*** at 331-34. This holding was followed and aptly described in ***Gammons***, 2001 WI App 36 at ¶¶7-9.

> In [***Griffin***], we held that "the absence of a registration plate, and reasonable inferences that can be drawn from that fact, constitute[] reasonable suspicion sufficient to justify an investigatory stop of a motor vehicle." In ***Griffin***, the defendant's vehicle bore a "license applied for" sign. We reasoned that, without stopping the vehicle, the officers in ***Griffin*** had no way of knowing whether the defendant was in violation of vehicle registration laws.

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detained, the officer had neither smelled an odor of intoxicant nor observed Colstad exhibit any other sign of intoxication. There was no indication that Colstad was speeding, driving erratically, or deviating from his lane of traffic. At the same time, the unexplained nature of the collision, especially in light of Colstad's assertion that he was driving slowly and looking out for children, was cause for some suspicion.

*Id.* at ¶7 (citations omitted). The state supreme court also relied on ***Griffin*** when it explained: "[A]n officer may make an investigative stop if the officer `reasonably suspects' that a person has committed or is about to commit a crime, or reasonably suspects that a person is violating the non-criminal traffic laws ...." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (footnote and citations omitted).[3]

¶12. We acknowledge that some United States Supreme Court cases seemingly assume that probable cause is needed to support a stop for civil infractions. *See, e.g.*, ***City of Indianapolis v. Edmond***, 531 U.S. 32, 51 (2000) ("The reasonableness of an officer's discretionary decision to stop an automobile ... turns on whether there is probable cause to believe that a traffic violation has occurred."); ***Whren v. United States***, 517 U.S. 806, 810 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). However, we have not found any United States Supreme Court decision squarely addressing this topic. Taking the ***Whren*** decision as an example, the Tenth Circuit explains:

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[3] We note that courts in other jurisdictions permit an investigatory stop for civil infractions. See ***United States v. Botero-Ospina***, 71 F.3d 783, 787 (10th Cir. 1995) (holding that "a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police offer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring "); ***Berge v. Comm'r of Pub. Safety***, 374 N.W.2d 730, 732-33 (Minn. 1985) (reasonable suspicion of failing to stop at a stop sign); ***State v. Farabee***, 22 P.3d 175, 178-79 (Mont. 2000) (reasonable suspicion of driving with inoperable headlight); ***State v. Henderson***, 966 P.2d 137, 140-41 (Mont. 1998) (reasonable suspicion of operating without required license plates); ***State v. Ova***, 539 N.W.2d 857, 858-60 (N.D. 1995) (reasonable suspicion of careless driving).

In ***Whren***, the [United States Supreme] Court stated that, "[a]s a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred." ...

While [***Whren*** and similar cases] indicate that probable cause is a *sufficient* ground for a stop, none of them indicates that it is *necessary* for a stop. Other Supreme Court and Tenth Circuit cases have held that reasonable articulable suspicion is also sufficient grounds to justify a stop.

***United States v. Callarman***, 273 F.3d 1284, 1286 (10th Cir. 2001) (citations omitted).

¶13. Accordingly, we are bound to follow the rule set out in ***Griffin***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Because Colstad's temporary detention was proper *if* supported by reasonable suspicion that Colstad violated a civil traffic ordinance, we proceed to address whether the facts known to police constituted reasonable suspicion.

¶14. The undisputed testimony demonstrates that the collision occurred on a straight road with "absolutely clear" conditions and no trees, obstructions, or parked cars on the side of the road. Colstad explained that, although he was driving slowly because he knew children were in the area, a child ran into the road and into the side of his pickup truck. One possible explanation is that provided by Colstad: Colstad was exercising due care and the child darted into his path.[4] However, another reasonable explanation is that

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[4] The evidence does not specify exactly where the child lay in relation to Colstad's truck. We only know that the child lay "to the front" of Colstad's truck. This might mean in front of his truck or to the side of his truck near the front, but behind the front.

Colstad hit the child because Colstad was not exercising proper attentiveness. The officer was not required to believe Colstad's explanation. Therefore, we conclude that the officer possessed a reasonable suspicion that Colstad was guilty of inattentive driving, contrary to Wis. Stat. § 346.89(1).[5]

### *B. Whether Colstad's Detention was an Illegal De Facto Arrest*

¶15. Colstad next argues that his detention was not "temporary," but was instead a *de facto* arrest because of its extended duration. He further argues that his *de facto* arrest was illegal because it was not supported by probable cause.

¶16. A brief investigatory stop is permitted when the length and scope of a detention is reasonable:

> For the stop of a person to pass constitutional muster as investigatory, the detention must be temporary and last no longer than is necessary to effect the purpose of the stop. "Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." A hard and fast time limit rule has been rejected. In assessing a detention for purposes of determining whether it was too long in duration, a court must consider "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain" the suspect. In making this assessment, courts "should not indulge in unrealistic second-guessing." In assessing a detention's validity, courts must consider the

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[5] WISCONSIN STAT. § 346.89(1) reads: "No person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle." The punishment for violating § 346.89(1) is a fine of not less than $20 nor more than $400. *See* WIS. STAT. § 346.95(2).

"`totality of the circumstances-the whole picture,'" because the concept of reasonable suspicion is not "`readily, or even usefully, reduced to a neat set of legal rules.'"

***State v. Wilkens***, 159 Wis. 2d 618, 625-26, 465 N.W.2d 206 (Ct. App. 1990) (internal footnoted citations omitted).

¶17. Colstad argues that the duration of his detention was unreasonable because the officer directed him to wait, instead of questioning Colstad sufficiently to dispel or confirm the officer's suspicions, and because Colstad was made to wait approximately thirty to forty-five minutes before the officer resumed questioning. The State responds that the duration of the detention was reasonable given the chaotic accident scene and need for the officer to attend to the victim and process the scene. We agree with the State.

¶18. Between the first and second contacts with Colstad, the officer was providing medical assistance to the injured child, investigating the scene, taking photographs, and marking the scene. It was reasonable for the officer to direct Colstad to wait while the officer performed these tasks. Furthermore, to the extent the officer made observations about the victim and the scene during this time, the officer was acting to dispel or confirm his suspicions, consistent with the purpose of a temporary investigative stop. Accordingly, we reject Colstad's contention that his temporary detention became a *de facto* arrest at some point prior to the time the officer resumed speaking with him.

*C. Propriety of Continued Detention to Administer Field Sobriety Tests*

¶19. Colstad next argues that the officer's second contact with him elicited no new information that would

justify continuing Colstad's detention to administer field sobriety tests. We disagree.

If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun. The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.

***State v. Betow***, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Thus, we must determine whether the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that Colstad was driving while under the influence of an intoxicant.

¶20. Colstad acknowledges that the officer smelled a mild odor of alcohol during the second contact, but argues that a mild odor of alcohol alone does not provide reasonable suspicion because it is not illegal in Wisconsin to drive after consuming alcohol. Colstad further points out that the officer did not observe any other indication of intoxication, such as balance problems, slurred speech, or bloodshot eyes. Finally, Colstad asserts that accidents caused by a child darting into the path of a vehicle are typically not the fault of the driver, and thus the accident did not provide evidence of intoxicated driving, citing ***State v. Caibaiosai***, 122 Wis. 2d 587, 603-04, 363 N.W.2d 574 (1985) (Abrahamson, J., dissenting) (suggesting that "a child who darts into the path of the car ... from between parked cars" is a situation where the driver is not typically at fault).

¶21. We disagree that the only indication of Colstad's intoxication was the mild odor of alcohol, and repeat that the officer was not obliged to accept as true Colstad's assertion that the child suddenly darted into the path of his truck. The officer did not know what caused the collision, but he did know it was not caused by a child darting out from behind an obstruction, such as a parked car. Even assuming the child ran quickly toward Colstad's truck, typically a person driving slowly and watchful of nearby children can respond quickly if a child unexpectedly runs toward his or her car. A prudent driver would not pass so close to the children that he or she could not respond to a sudden move. Thus, one reasonable possibility was that Colstad struck the child with his pickup truck because his judgment and driving skills were impaired by alcohol. The officer properly extended the stop to conduct field sobriety tests.

*D. Whether the Result of the Preliminary Breath Test was Properly Considered When Assessing Probable Cause to Arrest*

¶22. Colstad argues that the officer lacked authority to administer a preliminary breath test (PBT) and that, without the result of that test, Colstad's subsequent arrest and blood draw were not supported by probable cause. In Colstad's view, this means the results of his subsequent blood test should have been suppressed.

¶23. Wisconsin Stat. § 343.303 authorizes an officer to administer a preliminary breath test when the officer has "probable cause to believe" the person is violating or has violated a drunk driving law. In this context, "`probable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop, ... but less than the level of proof required to establish probable cause for arrest." ***Renz***, 231 Wis. 2d at 316.

¶24. Colstad points to several undisputed facts and argues that they show the officer did not possess "probable cause to believe" Colstad had been driving while intoxicated. Colstad points out that during the balance-and-count test, he exhibited no problem with his balance; that during the walk-and-turn test, he only stepped off the imaginary line twice and there was no testimony that his mild "upper body sway" was significant; that during the alphabet test, he slurred only the letters L, M, N, and O, which he contends frequently sound slurred because people often accelerate through these letters in tune to the "ABC" song; and that at no other time did the officer observe Colstad slur his speech or exhibit a lack of proper balance. According to Colstad, if field sobriety tests are to serve any function, "persons who perform well on the tests should not be further detained."

¶25. Colstad's argument is based on a selective view of the evidence. It is true the officer testified that Colstad performed "better than most" on the field sobriety tests, but the officer's testimony nonetheless demonstrates that Colstad erred on each of the sobriety tests. Colstad began the balance-and-count test prematurely, indicating divided attention-a sign of intoxication. During the balance-and-count test, Colstad was directed to count from one thousand one to one thousand thirty, but stopped including "one thousand" in his count upon reaching one thousand sixteen. He continued counting from seventeen to thirty without saying "one thousand." On the walk-and-turn test, Colstad twice failed to walk toe-to-heel in a straight line. Regarding the alphabet test, the officer rejected the characterization that Colstad simply accelerated during the letters L, M, N, and O. Rather, the officer asserted that Colstad slurred his speech during these letters. When Colstad's performance of the field sobriety tests is combined with the mild odor of intoxicants and the suspicious circumstance of Colstad's truck colliding

with a child on an unobstructed street where Colstad was allegedly watching for children, the totality of the facts supports "probable cause to believe" Colstad was driving while intoxicated.

¶26. Accordingly, the officer possessed "probable cause to believe," within the meaning of Wis. Stat. § 343.303, and was authorized to administer the PBT.

¶27. Colstad contends the PBT result should not have been considered for two additional reasons: (1) the State failed to demonstrate at the suppression hearing, as required by Wis. Stat. § 343.303, that the PBT used was "approved by the department" for preliminary breath testing,[6] and (2) the

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[6] WISCONSIN STAT. § 343.303 reads, in relevant part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63(1) or (2m) or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 or s. 940.09 where the offense involved the use of a vehicle, ... the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63(1), (2m), (5) ... or a local ordinance in conformity therewith, or s. 346.63(2) or (6) or 940.25 and whether or not to require or request chemical tests as authorized under s. 343.305(3). The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest, if the arrest is challenged, or to prove

PBT evidence was inadmissible at the suppression hearing under ***State v. Doerr***, 229 Wis. 2d 616, 599 N.W.2d 897 (Ct. App. 1999), because it was not accompanied by expert testimony. We reject both arguments.

¶28. Colstad's statutory "approved by the department" argument has been waived. Before the circuit court, Colstad argued only that the PBT evidence was inadmissible under ***Doerr*** because it was not supported by expert testimony. Colstad did not apprise the circuit court that he was objecting under the "approved by the department" provision of Wis. Stat. § 343.303. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (issues not presented to trial court will not be considered for the first time on appeal).[7]

¶29. Colstad's contention that expert testimony is a prerequisite for admission of a PBT result at a suppression hearing is not supported by ***Doerr***. In ***Doerr***, we concluded that, in a trial on a charge *other than* a motor vehicle violation, admission of a PBT result requires expert testimony to establish "the device's scientific accuracy and reliability and [to] prove compliance with accepted scientific methods as a foundation for the admission of the test results." ***Doerr***, 229 Wis. 2d at 625. ***Doerr*** does not require that expert testimony accompany PBT results in cases involving motor vehicle violations. *See* ***id.*** at 622-25.

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that a chemical test was properly required or requested of a person under s. 343.305(3).

[7] The ***Doerr*** decision states that "[t]he PBT device has not been approved by the DOT." ***State v. Doerr***, 229 Wis.2d 616, 624-25, 599 N.W.2d 897 (Ct. App. 1999). We assume this statement is directed at the particular PBT device used in Doerr. A current listing of approved PBTs is available from the Chemical Test Section of the Wisconsin State Patrol. *See* Note to WIS. ADMIN. CODE § TRANS 311.04.

***Conclusion***

¶30. For the above reasons, we sustain the trial court's decision to deny Colstad's suppression motion. We affirm Colstad's conviction.

*By the Court.*-Judgment affirmed.

[Filed April 22, 2003]

SUPREME COURT OF WISCONSIN
[formal parts omitted]

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No. 01-2988-CR State v. Colstad L.C. #00CF162

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Guy W. Colstad, and considered by this court:

IT IS ORDERED that the petition for review is denied, without costs.